United Nations CEDAW/C/70/D/92/2015

Convention on the Elimination of All Forms of Discrimination against Women

Distr.: General
15 August 2018

Original: English

Committee on the Elimination of Discrimination against Women

Decision adopted by the Committee under article 4 (2) (e) of the Optional Protocol, concerning communication No. 92/2015*,**

Communication submitted by:	N.M. (represented by counsel, Howard Kennedy)
Alleged victim:	The author
State party:	Turkey
Date of communication:	4 June 2015 (initial submission)
References:	Transmitted to the State party on 22 July 2015 (not issued in document form)
Date of adoption of decision:	9 July 2018

* Adopted by the Committee at its seventieth session (2–20 July 2018).

** The following members of the Committee participated in the examination of the present communication: Gladys Acosta Vargas, Nicole Ameline, Magalys Arocha Domínguez, Gunnar Bergby, Marion Bethel, Louiza Chalal, Esther Eghobamien-Mshelia, Náela Gabr, Hilary Gbedemah, Nahla Haidar, Ruth Halperin-Kaddari, Yoko Hayashi, Lilian Hofmeister, Dalia Leinarte, Rosario Manalo, Lia Nadaraia, Aruna Devi Narain, Bandana Rana, Patricia Schulz, Wenyan Song and Aicha Vall Verges.

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1. The author of the communication is N.M., a citizen of Singapore, born in 1976. She claims to be a victim of violations by Turkey of articles 2, 3, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsel, Howard Kennedy. The Convention and the Optional Protocol thereto entered into force for Turkey on 20 December 1985 and on 29 October 2002, respectively.

Facts as presented by the author

2.1 In 1997, the author married a Turkish national, with whom she had two daughters in Turkey. The first, Z.K., was born in 1999 and the second, H.K., in 2001.

2.2 In 2003, the family moved to Malaysia. In 2004, the father left the family home after having pronounced a *talaq*, declaring that he was separating from his wife. The daughters continued to live with their mother, in Malaysia. The mother retained the passports of the children and other identity documents, including their exit cards. The same year, formal divorce proceedings began in Singapore at the Syariah Court.

2.3 On 28 March 2005, without the author's consent, the father obtained "letters of consent" and Turkish travel documents for H.K. from the Consulate of Turkey in Singapore. The author claims that she was unaware of those actions. On 16 February 2006, the father removed the children from the home and school without the author's agreement. The father "made threats and used violent behaviour against the mother". He subsequently returned the children to the author's care. The author filed a police report about the incident.

2.4 On 24 February 2006, the father spent a weekend with the children, pursuant to an agreement between the parents. On that occasion, the father abducted the children, taking them from Malaysia to Turkey. On 27 February 2006, the father's brother notified the author that the children were in Turkey. The author filed a police report in Malaysia and a warrant was issued for the father's arrest. On 29 February 2006, the author lodged a complaint at the Consulate of Turkey in Singapore and, early in March 2006, travelled to Turkey.

2.5 In the meantime, in March 2006, the father brought a divorce-guardianship suit against the author in Turkey. On 21 March 2006, in an expert report for the Turkish family court, it was recommended that, in the event of a divorce, custody be awarded to the author, with custody remaining with the father in the interim period. On 4 April 2006, the father's divorce-guardianship suit was rejected by a family court in Kocaeli, as the father had withdrawn his request for divorce and guardianship.

2.6 On 10 April 2006, the author filed a police report in Turkey, including in the report the father's address and the details of the abduction in Malaysia. She also stated that she wanted the children returned to her care. On 18 April 2006, she filed a report with the Chief Public Prosecutor of Istanbul. On the same day, the author applied for divorce proceedings in Turkey, in a second family court in Kocaeli. On 25 July 2007, the divorce proceedings ended because the author had withdrawn the petition by a letter dated 4 June 2007.

2.7 Also on 18 April 2006, the father initiated divorce proceedings in Turkey.

2.8 On 8 August 2006, the author and the father were formally divorced in Singapore. The court granted custody of the children to the author, but the children remained in Turkey with their father.

2.9 On 19 March 2007, an expert report commissioned by the Office of the Attorney General of Turkey to compare the signatures of the author with the signatures on the letters of consent concluded, by analysing a copy of the letters of consent rather than the originals, that it was indeed the author's signature appearing on the letters of

consent for travel documents to be issued for the children in view of their departure from Singapore. On that basis, on 21 March 2007, the Office of the Public Prosecutor decided not to prosecute the father for abduction or forgery. On 4 May 2007, the author appealed against the decision in a high criminal court in Sakarya. On 14 May 2007, her appeal was rejected.

2.10 On or about 26 May 2007, the author secretly took her daughters to the Syrian Arab Republic. The author was detained by the Syrian authorities. The children and the author were returned to Turkey following a request by the Turkish Ambassador to the Syrian Arab Republic. On 19 July 2007, a Turkish court ruled that the author would not be prosecuted for taking her children to the Syrian Arab Republic. That ruling was upheld on appeal, on 15 December 2007.

2.11 On 5 February 2010, the Office of the Chief Public Prosecutor in Kocaeli ruled that there were no grounds for prosecuting the father for forgery or abduction. On 18 February 2010, the author appealed against the decision in a second high criminal court in Sakarya. On 28 April 2010, the court rejected her appeal and upheld the decision not to have the father prosecuted. In the author's opinion, domestic remedies have thus been exhausted as to the issue of abduction and forgery.

2.12 In the meantime, on 18 December 2007, the father had filed a divorce suit in the first family court in Kocaeli. The divorce and custody proceedings in that court were completed on 27 April 2011, and, on 10 June 2011, the court issued its decision, granting the father custody of the children. The author lodged an appeal on 15 June 2011 with the Supreme Court of Appeals of Turkey. On 29 November 2011, the author was informed that her appeal would be heard in May 2012. On 24 September 2012, the Supreme Court of Appeals upheld the judgment of the lower court.

2.13 The author explains that, since the abduction, she has had very little contact with her two daughters. The Turkish courts have ruled that she can have only supervised contact with the children, for 4–5 hours per month and on religious holidays. The author flies from Malaysia to Turkey for those visits and bears the costs alone.

2.14 During the author's visits to Turkey in 2006 and 2007, she reported to the police instances of violence and aggressive behaviour by the father towards her. She also claims that the contact arrangements between her and the children, as determined by the courts, have sometimes been ignored by the father.

Complaint

3.1 The author claims that she is a victim of gender-based discrimination under the Convention, in violation of articles 2, 3, 15 (read in conjunction with general recommendation No. 21 (1994) on equality in marriage and family relations) and 16 (1) (c) and (d). She asserts that there are two grounds for the violation. First, the Turkish authorities failed to prevent the abduction of her children and to safeguard the author's rights as a mother. Second, the Turkish authorities failed to provide the author with access to an effective remedy through the courts.

3.2 The author contends that she did not sign the letters of consent in Singapore and that her signature was forged. The only evidence provided by the father was an expert report (see para. 2.9) stating that the signatures on the letters of consent were those of the author. The experts worked on copies of the letters and not the originals. The author contends that, even if she had signed the letters of consent, the Consulate of Turkey should not have issued travel documents for the daughters. The father claimed that the author had in fact been present at the Consulate when he had obtained the travel documents, but fully veiled and therefore not identifiable. The author contends that her passport stamps prove that she was in Malaysia at that time and that the father's argument discloses a discriminatory attitude towards women who choose to

wear the veil. The presumption in favour of the father's version of events by the Turkish authorities demonstrates that the author's evidence is being accorded less weight owing to her gender and exposes the systemic culture of accepting the views of men in family matters, in violation of articles 15 (read in conjunction with general recommendation No. 21) and 16 (1) (c) of the Convention, respectively.

3.3 The author reported the abduction of her daughters to the Turkish police on 10 April 2006. However, no action was taken until March 2007. The excessive delays in relation to the civil and criminal proceedings, the failure to deal with the author's allegations expeditiously and the failure to provide her with an effective judicial remedy violated article 15 of the Convention, read in conjunction with general recommendation No. 21.

3.4 From the moment that the author reported the abduction to the police in Turkey, the authorities failed to safeguard her rights as a parent by ensuring adequate contact with her daughters. By failing to protect those rights, the State party had violated article 16 (1) (d) of the Convention. The author claims that the failure to enforce contact orders stems from an ingrained belief that the father, as the head of the household, is the primary decision-maker, which violates article 16 (1) (c) of the Convention, read in conjunction with general recommendation No. 21.

State party's preliminary observations on admissibility

4. By a note verbale dated 16 September 2015, the State party challenged the admissibility of the communication. It affirmed that domestic remedies had not been exhausted, because the author's appeal concerning the divorce and guardianship was still pending. Furthermore, according to article 148 of the Constitution of Turkey, the author has the right to submit to the Constitutional Court an individual application claiming that her human rights have been violated after the completion of the appeals process.

Author's comments on the State party's preliminary observations on admissibility

5.1 On 11 February 2016, the author submitted comments on the State party's observations on admissibility. She notes that the State party's observations are inaccurate, as no pending appeal subsists in her case. She clarifies that there were two sets of proceedings in Turkey: one arising from the abduction and forgery (criminal proceedings) and one arising from the divorce (civil/family proceedings).

5.2 Judgments rendered after 23 December 2012 [1] may be challenged in an individual application to the Constitutional Court on the grounds of the fundamental rights and freedoms protected by the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). In her case, the criminal proceedings were concluded on 28 April 2010, when the second high criminal court in Sakarya upheld the decision not to prosecute the father for forgery and kidnapping. Because that decision predated the Constitutional Court application process, domestic remedies regarding the criminal proceedings have been exhausted, with no possibility of appeal before the Constitutional Court.

5.3 Concerning the family proceedings, the Supreme Court of Appeals upheld the judgment of the lower court on 24 September 2012. The author states that her lawyer advised her that an appeal to the Constitutional Court would not have been acknowledged because it was a private matter and that she therefore had no standing to act. The author contends that, even if she had had standing to appeal, the

[1] In fact, judgments rendered after 23 September 2012 may be appealed before the Constitutional Court under the provisions of the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey (Act No. 6216). See paragraph 6.3 below.

Constitutional Court could not have provided her with an effective remedy. Because an application to the Constitutional Court would have been made only in relation to the family proceedings, the remedy would not have been effective because the criminal and family matters were so interwoven that it would not have been possible to produce a fair and comprehensive result based on the facts of the family matter alone. The author notes that the Committee may waive the requirement for domestic remedies to have been exhausted where it has been observed that there would be no effective remedy in the national (appeals) courts.

5.4 The author further contends that she was advised by her lawyer in Turkey that all domestic remedies had been exhausted at the time of the initial petition. If that advice was incorrect, the author asserts that she should not be barred from seeking a remedy on the basis of her reliance on his negligent advice.

State party's observations on admissibility and merits

6.1 By a note verbale dated 18 April 2017, the State party submitted its observations on admissibility and the merits of the case.

6.2 The State party first submits that the author failed to provide specific evidence regarding the alleged violations of articles 15 and 16 of the Convention. In addition, the Convention cannot be invoked with regard to the author's contention that the investigation was not conducted with due diligence. The scope of the Committee's examination covers only claims of violations of rights enshrined in the Convention, and any claims regarding the fairness of the investigation fall outside that scope.

6.3 As to the family proceedings, the State party reiterates that the author did not lodge an individual application to the Constitutional Court and therefore failed to exhaust domestic remedies. In that connection, the State party notes that the decision of the Supreme Court of Appeals, dated 24 September 2012, upholding the Kocaeli family court decision granting custody of the children to the father became final on 3 January 2013, at which point the parties did not apply for rectification of the judgment. The Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey (Act No. 6216), providing for an individual application to the Constitutional Court, came into effect on 24 September 2012. Under the Act, judgments that became final after 23 September 2012 can be challenged in an individual application to the Constitutional Court. Furthermore, the State party points out that the family court of Kocaeli had found, after taking into consideration the Convention on the Rights of the Child and the importance of receiving the opinions and preferences of the children, that it was in the best interests of the children to remain with the father. The court determined that the children had been staying with their father for a long time and were enrolled in school in Turkey. In an in-camera hearing during the proceedings, the children stated that they would like to stay with their father but remain in contact with the author. An interim injunction was given to allow the establishment of personal relations between the author and the children. Nevertheless, the author kidnapped the children and brought them to the Syrian Arab Republic. Furthermore, because the Malaysian authorities had issued an warrant for the arrest of the father, he could not enter Malaysia without being detained. The author, on the other hand, could enter and leave Turkey freely. The court had also noted that granting custody to the mother would effectively halt the relationship between the children and the father, to the detriment of the children's psychological development. Lastly, the State party asserts that the author provided no evidence for her allegations of gender-based discrimination regarding the family proceedings.

Author's further comments

7.1 On 21 August 2017, the author reiterated that the State party failed to provide her with an effective remedy because she is a woman. She contends that this

discrimination was exacerbated by the fact that she is not a Turkish national and that the Turkish legal system is biased towards Turkish men as the heads of family, to whom responsibility for children is given.

7.2 The author claims that the State party failed to comply with the Convention on the Civil Aspects of International Child Abduction and, furthermore, disregarded the decisions of the courts of Singapore and Malaysia, which accorded sole custody to the author.

7.3 The author states that procedural fairness and due process are not limited to an express right to a fair trial, but are concepts incorporated in the principles of equality of the Convention and therefore do not fall outside the scope of the Convention.

7.4 The author objects to the State party's assertion that the signature for the children's travel documents was not forged and offers to submit the conclusions of an internationally recognized expert from Singapore to show that her signature was forged. She further states that the State party's description of the in-camera hearing of the children is incorrect.

7.5 The author reiterates that she has exhausted all domestic remedies and rejects the assertion that there is an effective remedy before the Constitutional Court.

7.6 Despite expressing regret for having taken her children to the Syrian Arab Republic and emphasizing that she is committed to using the rule of law to have her children returned to her, the author points out that she was forced to take matters into her own hands, owing to obstacles repeatedly put in her way by the Turkish authorities.

Further information by the State party

8.1 On 13 November 2017, the State party reiterated its previous observations and emphasized that the Turkish legal system was based on the principle of equality before the law, that article 41 of the Constitution provided a framework for equality between men and women, and that the civil system was based on the principle of equality.

8.2 The State party notes that the author's allegations regarding the Convention on the Civil Aspects of International Child Abduction fall outside the competence of the Committee. Furthermore, since Malaysia is not a party to that instrument, it cannot be applied in this case. Lastly, the State party emphasizes that the author did not apply to the Constitutional Court regarding the family proceedings and, therefore, domestic remedies have not been exhausted on that point.

Further information by the author

9. On 8 March 2018, the author emphasized that the Committee was competent to consider the Convention on the Civil Aspects of International Child Abduction because it could take into account general principles of international law. The author reaffirms that she was discriminated against by the State party, as a woman and as a foreigner. She reiterates that her children were not returned to her promptly because the father received advantageous treatment owing to his gender. Lastly, the author emphasizes that, in her view, all domestic remedies have been exhausted.

Issues and proceedings before the Committee: consideration of admissibility

10.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

10.2 The Committee notes first that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

Therefore, it is not precluded by article 4 (2) (a) of the Optional Protocol from examining the present communication.

10.3 The Committee further notes that the State party challenges the admissibility of the present communication under article 4 (1) of the Optional Protocol, on the grounds that the author did not apply to the Constitutional Court against the decision of the Supreme Court of Appeals of 24 September 2012, upholding the decision of the family court in Kocaeli of 10 June 2011, whereby the father was granted custody of the children, which, according to the State party, became final on 3 January 2013. According to the State party, the author has thus failed to exhaust domestic remedies.

10.4 The Committee recalls first that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication unless it has ascertained that all available domestic remedies have been exhausted, except if the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

10.5 The Committee has taken note of the author's explanations regarding the ineffectiveness of exhausting domestic remedies with regard to the family proceedings in her case, because an application to the Constitutional Court would have been made only in relation to the family proceedings and the remedy would not have been effective because the criminal and family matters were so interwoven that it would not have been possible to produce a fair and comprehensive result. The Committee, however, notes that court judgments rendered in Turkey after 23 September 2012 may be challenged in an individual application to the Constitutional Court on the grounds of the fundamental rights and freedoms protected by the Constitution of Turkey and the European Convention on Human Rights. No objection has been formulated as to the accessibility of the procedure. In addition, nothing from the material on file allows the Committee to conclude that the remedy in question would not be effective in divorce and child custody cases or that the author could not obtain redress through this particular remedy, had she appealed to the Constitutional Court. The author has not, for example, shown that the appeal is not applicable in divorce or child custody proceedings, or that appeals similar to hers have been dismissed by the Constitutional Court without consideration. A mere declaration that a constitutional appeal in Turkey does not constitute an effective remedy cannot justify an exception by the Committee of the admissibility requirements set out in article 4 (1) of the Optional Protocol. Accordingly, the Committee declares that this part of the communication is inadmissible under article 4 (1) of the Optional Protocol.

10.6 The Committee has further taken note of the author's claims under articles 2, 3, 15 (read in conjunction with general recommendation No. 21) and 16 (1) (c) and (d) of the Convention. However, it notes that the author has not provided sufficient information and explanations in support of her claims. In the absence of any further information or explanations on file, the Committee concludes that that part of the communication is inadmissible under article 4 (2) (c) of the Optional Protocol.

11. The Committee therefore decides:

(a) That the communication is inadmissible under articles 4 (1) and (2) (c) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.